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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 379

PAN-AMERICAN LIFE INSURANCE COMPANY,

Petitioner,

v.

MARIE LORIDO,

Respondent.

Appendix To Petition for a Writ of Certiorari to The Supreme Court of the State of Florida

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MINISTRY OF JUSTICE

LAW No. 568

(FOREIGN EXCHANGE CONTRABAND LAW)

I, Osvaldo Dorticos Torrado, President of the Republic of Cuba, do hereby proclaim that the following law has been enacted by the Council of Ministers and approved by me, to wit:

WHEREAS: Title II of Law No. 13 of December 23,

1948, provided for the organization of the Currency Stabilization Fund, and entrusted it with the fundamental mission of protecting the national currency on the exchange market, for which purpose the legislation supplementary thereto broadened the scope of its powers vesting it with the authority necessary for the regulation of international exchange transactions.

WHEREAS: During the years in which the tyranny was in power a constant drainage of foreign exchange was propitiated to cover the funds taken away by the beneficiaries of the deposed government, a practice which some interested parties are still trying to continue through speculation and by deviating the channels of incoming foreign exchange on which the nation depends, or by the remittance of foreign funds through illegal methods, thereby ostensibly delaying the restoration of our monetary reserves and the preferential application of the national resources to the economic development of the nation.

WHEREAS: It is necessary therefore, to define clearly and precisely the felonious acts constituting crimes against the economy of the nation, fixing the penalties applicable to the different degrees of criminal liability, and to confer upon the Currency Stabilization Fund and the judiciary the broad powers required for the protection of the general interests of the Republic.

NOW, THEREFORE: In pursuance of the powers vested in it, the Council of Ministers has resolved to enact the following

App. 3

LAW NO. 568

Article 1.— For the purposes of this law, the following are considered felonies of monetary contraband:

* * *

6. To export currency or securities, or to transfer funds to points abroad by means of checks, transfers, drafts, letter-orders, orders of payment, compensations, travellers checks, letters of credit, reimbursements of collections, purchases or sales of passage tickets or through any other similar means, regardless of the origin or source of the funds, except for those cases authorized by the Currency Stabilization Fund, through a member bank or a firm duly authorized by Banco Nacional de Cuba.

7. To export or import national currency in excess of the limit that set now or hereafter by the Currency Stabilization Fund.

8. To establish credits in national currency for persons residing abroad or for residents of Cuba for the account of residents abroad.

9. To assign or transfer credits in national currency to residents abroad, make payments for their account in national currency and set up credits in bank accounts the holders whereof reside abroad without first complying with the rules issued by the Currency Stabilization Fund in this respect.

10. To receive and credit to bank accounts kept abroad, or to transfer to third parties collections made

abroad for business transacted or services rendered in Cuba, regardless of the source or origin of the respective funds.

11. To secure financing payable abroad in foreign currency without the prior authorization of the Currency Stabilization Fund, except for transactions of banks associated to the Banco Nacional de Cuba with their home offices or foreign correspondents for the establishment of letters of credit, overdrafts and other normal activities of the banking business.

12. Any other violation or infringement of the rules of the Currency Stabilization Fund under which funds are transferred or remitted abroad in violation of the prohibitive rules of the same Fund or in a larger amount than is permitted thereby.

App. 5

CUBA
NATIONALIZATION LAW

July 6, 1960[1]

[Translation]

WHEREAS: The attitude assumed by the Government and legislative power of the United States of America of constant aggression for political purposes against the fundamental interests of the Cuban economy, emphatically evidenced by the amendment recently passed by the Congress of said country to the Sugar Act at the request of the executive power, by which the President of that nation is granted exceptional powers to reduce the participation of Cuban sugar in the sugar market of that country, as an arm of political action against Cuba, obliges the Revolutionary Government to adopt without hesitation, also the measures that it may deem pertinent for the defense of the national sovereignty and the free economic development of our country.

WHEREAS: Article 24 of the fundamental law authorizes the expropriation of properties referring to the regular law the naming of the authority competent to order the expropriation as well as the regulation of the procedure, and of the means and forms of payment.

WHEREAS: It is convenient for the achievement of the purposes proposed in the first WHEREAS clause of this law to grant to the President of the Republic and to the Prime Minister full powers to proceed with the na-

[1]Cuba, Gaceta Oficial, July 7, 1960; Folletos de Divulgacion Legislativa, XXII Leyes del Gobierno de la Revolution (julio 1960), p. 29.

tionalization of all concerns and properties of natural or juridical persons of the United States of America or of the concerns in which said persons have a majority interest or share, even though they may be organized under the Cuban laws, in order that in each future circumstance adequate measures for said purposes may be adopted.

THEREFORE: In use of the powers vested in it, the Council of Ministers has resolved to enact the following Law Number 851:

ARTICLE 1: The president of the Republic and the Prime Minister are authorized to order jointly by means of resolutions, whenever they may deem it convenient in defense of the national interest, the nationalization through expropriation, of the properties or concerns belonging to natural or juridical persons, nationals of the United States of America, or the concerns in which said persons have a majority interest or participation even though they be organized under the laws of Cuba.

ARTICLE 2: The President of the Republic and the Prime Minister in the resolution in which they order the expropriation shall declare its necessity and the cause of public use or national interest that has caused it.

ARTICLE 3: The President of the Republic and the Prime Minister in the resolutions referred to in Article 1 shall also appoint the persons or organizations that shall have charge of the properties or concerns subject of the expropriation.

RESOLUTION NO. 3

WHEREAS, The imperialist interests whose representatives control the Government of the United States of North America; in their intention to utilize every means which they consider effective to impede the consolidation of the Cuban Revolution, have continued committing aggressions, every day more unscrupulous and criminal, against the economy of the nation.

WHEREAS, Among the multiple measures adopted by the Government of the United States of North America, there stands out for its exceptional aggressiveness that of the general embargo on exportations from that country to Cuba with the intention of strangling our economy.

WHEREAS, That measure, in addition to violating the most elemental standards of international existence, constitutes an act of political coercion with which it pretends uselessly to weaken the popular force of the Cuban Revolution by creating difficulties for national supplies.

WHEREAS, It is evident that this conduct of the Government of the United States of North America reveals the desperation and impotence of imperialism conducted by that Government, each day with more virulence, to employ the most unjust aggressions against our country.

WHEREAS, It is the duty of the Revolutionary Government to defend the economy of the country.

WHEREAS, Moreover, it is fundamental for the

liberation and economic development of our country that the North American commercial and industrial firms be liquidated which presently constitute the remainder in our country of the financial capital of that country.

THEREFORE, In use of the powers with which we are vested, in accordance with the provisions of Law No. 851 of June (sic July), 1960.

RESOLVED

FIRST There is declared the nationalization by means of forced expropriation, and, consequently, there are adjudged in favor of the Cuban State in full dominium all the properties and firms located in the National Territory and the rights and actions resulting from the exploitation of these properties and concerns which are the property of natural and juridical persons, nationals of the United States of America or operators of firms in which nationals of that country have a predominant interest, as follows:

* * *

Group XX — Insurance Companies

Pan American Life Insurance Co.

* * *

SECOND, Therefore, the Cuban state is declared subrogated in place and grade of the natural and juridical persons referred to in the preceding section with respect to the properties, rights and rights of action mentioned, as well as the assets and liabilities constituting the capital of the concerns referred to.

ARTICLES OF AGREEMENT OF THE INTERNATIONAL MONETARY FUND

The Governments on whose behalf the present Agreement is signed agree as follows:

Introductory Article

The International Monetary Fund is established and shall operate in accordance with the following provisions:

Article I

Purposes

The purposes of the International Monetary Fund are:

(i) To promote international monetary cooperation through a permanent institution which provides the machinery for consultation and collaboration on international monetary problems.

(ii) To facilitate the expansion and balanced growth of international trade, and to contribute thereby to the promotion and maintenance of high levels of employment and real income and to the development of the productive resources of all members as primary objectives of economic policy.

(iii) To promote exchange stability, to maintain orderly exchange arrangements among members, and to avoid competitive exchange depreciation.

(iv) To assist in the establishment of a multilateral system of payments in respect of current transactions between members and in the elimination of foreign exchange restrictions which hamper the growth of world trade.

(v) To give confidence to members by making the Funds resources available to them under adequate safeguards, thus providing them with opportunity to correct maladjustments in their balance of payments without resorting to measures of national or international prosperity.

(vi) In accordance with the above, to shorten the duration and lessen the degree of disequilibrium in the international balances of payments of members.

The Fund shall be guided in all its decisions by the purposes set forth in this Article.

INTERNATIONAL MONETARY FUND

Article VI. Capital Transfers.

Section 3. Controls of capital transfers.

Members may exercise such controls as are necessary to regulate international capital movements, but no member may exercise these controls in a manner which will restrict payments for current transactions or which will unduly delay transfers of funds in settlement of commitments, except as provided in Article VII, Section 3 (b), and in Article XIV, Section 2.

Article VIII. General Obligations of Members.

Section 1. Introduction

In addition to the obligations assumed under other articles of this Agreement, each member undertakes the obligations set out in this Article.

Section 2. Avoidance of restrictions on current payments.

(a) Subject to the provisions of Article VII, Section 3 (b), and Article XIV, Section 2, no member shall, without the approval of the Fund, impose restrictions on the making of payments and transfers for current international transactions.

(b) Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this agreement shall be unenforceable in the territories of any member. In addition, members may, by mutual accord, cooperate in measures for the purpose of making the exchange control regulations of either member more effective, provided that such measures and regulations are consistent with this Agreement.

Article XVIII. Interpretation.

a) Any question of interpretation of the provisions of this Agreement arising between any member and the Fund or between any members of the Fund shall be submitted to the Executive Directors for their decision. If the question particularly affects any member not entitled to appoint an executive director it shall be entitled to representation in accordance with Article XII, Section 3 (j).

(b) In any case where the Executive Directors have given a decision under (a) above, any member may require that the question be referred to the Board of Governors, whose decision shall be final. Pending the result of the reference to the Board the Fund may, so far as it deems necessary, act on the basis of the decision of the Executive Directors.

Article XIX. Explanation of Terms.

In interpreting the provisions of this Agreement the Fund and its members shall be guided by the following:

(i) Payments for current transactions means payments which are not for the purpose of transferring capital, and includes, without limitation:

(1) All payments due in connection with foreign trade, other current business, including services, and normal short-term banking and credit facilities;

(2) Payments due as interest on loans and as net income from other investments;

(3) Payments of moderate amount for amortization of loans or for depreciation of direct investments;

(4) Moderate remittances for family living expenses.

The Fund may, after consultation with the members concerned, determine whether certain specific transactions are to be considered current transactions or capital transactions.

International Monetary Fund and Bank for Reconstruction and Rehabilitation.

286. Acceptance of Membership by United States in International Monetary Fund.

The president is authorized to accept membership for the United States in the International Monetary Fund (hereinafter referred to as the "Fund"), and in the International Bank for Reconstruction and Development (hereinafter referred to as the "Bank"), provided for by the Articles of Agreement of the Fund and the Articles of Agreement of the Bank as set forth in the Final Act of the United Nations Monetary and Financial Conference dated July 22, 1944, and deposited in the archives of the Department of State.

286h. Status, privileges, and immunities of the United States.

The provisions of article IX, sections 2 to 9, both inclusive, and the first sentence of article VIII, section 2 (b), of the Articles of Agreement of the Fund, and the provisions of article VI, section 5 (i), and article VII, sections 2-9, both inclusive, of the Articles of Agreement of the Bank, shall have full force and effect in the United States and its Territories and possessions upon acceptance of membership by the United States in, and the establishment of, the Fund and the Bank, respectively.

LORIDO v. PAN AMERICAN LIFE INS. CO.

No. 61-L-791
Circuit Court, Dade County
June 6, 1962.

Hal P. Dekle, Circuit Judge

This action is at law by the surviving widow of the deceased insured. Plaintiff is named beneficiary in the policy in question. This case was duly tried before the court without a jury, there being no demand for jury trial.

The policy was issued in 1943 in New Orleans, Louisiana, but was delivered to the insured in Havana, Cuba, where he then lived and later died a Cuban national in 1960. There is no dispute that premiums have been duly paid. The issue arises by virtue of defendant's denial of liability on the grounds that the Cuban monetary decree of 1951 in pursuant of Cuban Law #13 of 1948, required all contracts theretofore payable in dollars to or by Cuban nationals in Cuba to be paid in Cuban pesos instead. Defendant contends that this modified the terms of the policy which provided for payment in United States dollars in New Orleans. Defendant additionally alleged that thereafter the insured agreed with the defendant that the terms of the policy be modified accordingly and submitted evidence that payments thereafter were in fact paid in pesos instead of dollars, thus adopting or ratifying the method of payment in pesos.

Defendant's third position is that the confiscation of defendant's insurance business in Cuba by Cuban Resolution #3 of October 24, 1960 avoids any liability under this

contract and that a post-Castro law #568 in 1959 prohibited the payment of any monies to Cuban nationals anywhere except in Cuba.

The court has rejected these same contentions, save that regarding the alleged action of the parties in subsequent dealings in pesos for payments under this policy, in this court's opinion of even date in Raij v. Pan American Life Ins. Co., circuit court of Dade County, in chancery, no. 61-C-7089 [19 Fla. Supp. 162].

The court finds in this cause that on the issue of the asserted change of the provision of the policy regarding payment in dollars the insured by his actions in both paying premiums and receiving benefits in pesos thereby accepted the modification for such payment under Cuban law for the purposes of his insurance contract, and that the terms of the policy for payment in dollars were effectively modified, and the insured, and now his beneficiary, this plaintiff, is bound thereby but is entitled to recover benefits hereunder in Cuban pesos or the equivalent thereof in United States dollars at the present United States exchange rate, based upon the face amount of the policy, interest and other benefits provided in the policy, and accordingly it is ordered that plaintiff do have and recover of and from the defendant said sums upon application and calculation of the amount involved as above provided.

It is further ordered that plaintiff do have and recover of and from defendant the further sum of $1,500 in United States dollars hereby fixed and awarded as a reasonable attorney's fee for services hereby by plaintiff's attorney.

RAIJ v. PAN AMERICAN LIFE INS. CO.

No. 61-C-7089
Circuit Court, Dade County
June 6, 1962.

Hal P. Dekle, Circuit Judge

Plaintiff purchased from defendant in 1942 a life insurance policy which was issued from the defendant's home office in New Orleans but delivered in Cuba to the plaintiff, a Cuban national and a resident of Cuba at that time. This was a twenty year endowment policy and all premiums were paid to and accepted by defendant until November 1960, when the premium was refused and returned. Subsequent tenders of such premiums have been refused and plaintiff seeks a declaration of his rights to pay the premium and to require the defendant to accept them and further to declare that such policy is in full force and effect.

Defendant admits issuance of the policy and payment and tender of premiums but disclaims any further liability under the policy, inter alia, on the ground that the Castro Revolutionary Government of Cuba on October 24, 1960, by its now well known Resolution #3, forcibly expropriated the Cuban division of defendant insurance company and substituted the present Cuban Revolutionary Government as "obligor" on all of defendant's Cuban liabilities and contracts, including plaintiff's insurance policy in question.

Although defendant asserts that the place of performance for payment of premiums and benefits is in

Cuba, the contract itself provides—"All payments regarding this policy, made either by the company or the insured, will be made in the City of New Orleans in legal currency of the United States of America."

"The law of the place of performance generally governs the contract and its discharge." Conflict of Laws, Sec. 385; Zimmerman v. Sutherland, 274 U.S. 253, 47 S. Ct. 625, 7 L. Ed. 1034.

The provisions of the contract for payment of the policy in New Orleans in United States dollars controls therefore unless defendant shows that such terms have been effectively changed. Defendant urges that this has been changed by virtue of a Cuban resolution prior to Castro, that after April, 1951, the United States dollar would cease to be legal tender in Cuba and that all contracts theretofore payable in dollars would be payable only in pesos. Defendant also asserts post-Castro law =568, prohibiting defendant from paying any monies to Cuban nationals anywhere except in Cuba, but counsel very wisely does not assert any argument of an extra-territorial effect, that such a Cuban law could affect the defendant in this bastion of freedom.

Of interest in this respect is Anglo-Continentale Treuhand, A.G. v. St. Louis Southwestern Rwy. Co., CCA 2 1936, 81 Fed. 2d 11, which deals with a contract providing for payment of bonds, either in gold or in the currency of several countries, including guilders in Holland. Plaintiff presented the bonds for payment in Amsterdam, giving rise to the question whether they thereby became payable in dollars calculated at the gold par of the guilder or, as defendant there contended, at the rate of exchange in

New York. Plaintiff's choice prevailed. Defendant asserted the congressional joint resolution removing the United States from the gold standard, urging that such U. S. law thus changed the choice provided in the contract. The court held to the contrary, and said at page 12—

> " . . . In its impact upon alien obligees as well, if construed as the defendant wishes, the resolution would have results which we ought not to impute to Congress gratuitously. It may be too much to say that a statute would be void which should undertake to discharge a citizen from a contract with an alien to be performed abroad; conceivably if the alien had to seek the obligor here, the statute would protect him. Yet no court of the place of performance would pay the least attention to it, if the citizen or his property fell within its power; by the law of most civilized countries the legality of the performance of a contract depends upon the law of the place of performance, and a contract is enforceable, if lawful by the law of the place of making when made, and if the performance is lawful by the law of the place of performance when due. Certainly that is true of our own law. Restatement of Conflict of Laws, ¤360. If the resolution had meant to prescribe otherwise, it would in substance have been an invasion of the prerogative of other states, and would be properly resented as contrary to the implications of mutual comity; we are justified in insisting that a statute must make such an intent plain beyond any doubt . . . "

Does the pre-Castro resolution effective in 1951

changing method of payment from dollars to pesos abrogate the private contract of insurance here? I do not believe that it does, absent recognition or adoption thereof by the parties which I do not find from the evidence. To grant such effect would of course be contrary to our basic precepts of contract and constitutional law. Defendant cites various cases recognizing actions of foreign countries and contrary to such principles, which point out that the nationals of those countries are bound by their own laws even though they do not comport with our recognized and cherished standards against abrogation of contract and confiscation without due compensation. Many of those cases deal directly with the particular res or property involved, as bank accounts, vessels, etc. See Salinoff v. Standard Oil Co., 262 N.Y. 220, 186 N.E. 679, 89 A.L.R. 345, U. S. v. Belmont, 30 U.S. 324, 81 L. Ed. 1134; Tillman v. Nat'l. City Bank of N. Y., 118 Fed.2d 631; Bernstein v. Van Heyghen, etc., 163 Fed.2d 246; Banco de Espana v. Federal Reserve Bank, 114 Fed.2d 438; Pons v. Republic of Cuba, 294 Fed.2d 925; Pasos v. Pan American Airways, 229 Fed.2d 271; The Clavereck, 264 Fed. 276; American Banana Co. v. United Fruit Co., 213 U.S. 347, 53 L.Ed. 826.

The burden of defendant's argument in this respect is that Cuban nationals are bound by such Cuban laws so as to prevent a decree on the subject contract against defendant. These cases have been studied. The trouble with defendant's contention is the express provision of an independent, private contract here, upon which plaintiff relied and remains entitled to rely and the fact that the evidence shows that payments of premiums were continued to be made in United States dollars in compliance with the terms of the contract so that both parties continued to recognize the contract and not the Cuban reso-

lution. It appears from the evidence that on some occasions pesos may have been used but converted to dollars in making premium payments.

To hold as defendant urges would make it impossible for foreign nationals to rely upon United States contracts and the express provisions thereof which would be reasonable inducements to such contracts. Neither can this court accept a proposition that would be in effect unilateral in avoiding liability. Seizure of defendant's business as unfortunate and abhorrent as it may be, is perhaps an incident risk of defendant doing business in a revolutionary climate. The seizure was of the defendant's —not the plaintiff's—interests and is not the same as the cases which defendant cites regarding confiscation of property which was the very subject matter of such other suits. Nor is there proof here of a novation which might effectively substitute the foreign government for the defendant as insurer as in Tillman v. National City Bank of N. Y., supra. Mutuality is of course an essential to a novation.

The case of Dougherty v. Equitable Life Assurance Society, 226 N.Y. 71, 193 N.E. 897, cited by defendant as in point, is distinguished by the express provisions in the contracts there that they were payable in Russian rubles from funds in Russia and were to be controlled by Russian law. Similarly Heinne v. N. Y. Life Ins. Co., 50 Fed. 2d 382, is distinguished where policies provided for payment in German marks. The Dougherty opinion notes at page 899—"The right to a sum of money due upon contract is to be determined by the terms of that contract the world over."

The court cannot justify a tendered distinction which would deny justice to Cuban nationals under these circumstances and rejects the contention that the courts of this country should not afford a forum to these distressed plaintiffs who find themselves homeless and without remedy in their own country. We would not forget the inscription on the Statue of Liberty from another great and grateful people, of France, in 1884—

"Not like the brazen giant of Greek fame,
With conquering limbs astride from land to land;
Here at our sea-washed, sunset gates shall stand
A mighty woman with a torch, whose flame,
Is the imprisoned lightning, and her name
Mother of Exiles. From her beacon-hand
Glows world-wide welcome; her mild eyes command
The air-bridged harbor that twin cities frame.
'Keep ancient lands, your storied pomp' cries she
With silent lips. "Give me your tired, your poor,
Your huddled masses yearning to breathe free,
The wretched refuse of your teeming shore,
Send these, the homeless, tempest-tost to me,
I lift my lamp beside the golden door!"

"The New Colossus" by Emma Lazarus.

We are still worthy of those challenging words in these present challenging days.

Accordingly the court finds and it is ordered that the plaintiff is entitled to pay and the defendant is required to accept the payment of premiums in United States dollars in accordance with the terms of the policy of insurance herein questioned and that such policy is in full force

and effect upon payment of tenders made and all premiums due to date and that the respective parties are bound by all the terms thereof, and that upon maturity, if all payments of premiums and requirements of plaintiff be met, the defendant will become obligated to the plaintiff in accordance with the terms of said policy.

It is further ordered that plaintiff is entitled to recover and that he do have and recover of and from the defendant an attorney's fee for services herein rendered in a sum to be fixed and awarded against the defendant as a reasonable attorney's fee herein upon testimony thereon being presented or upon affidavits if agreed by counsel.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA

THIRD DISTRICT
JANUARY TERM, A. D. 1963

CASE NO. 62-624

PAN-AMERICAN LIFE INSURANCE COMPANY,
Appellant,

vs.

MARIE LORIDO,
Appellee.

Opinion filed May 14, 1963

An Appeal from the Circuit Court for Dade County, Hal P. Dekle, Judge.

Dixon, DeJarnette, Bradford, Williams, McKay & Kimbrell, for appellant.

Ray A. Munson, for appellee.

Before PEARSON, C. J., and HORTON and HENDRY, JJ.

PER CURIAM.

Affirmed on the authority of Pan American Life Insurance Co. v. Recio, Fla.App.1963, ___ So.2d ___. [Case No. 62-452, opinion filed May 7, 1963, not yet reported.]

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA

THIRD DISTRICT

CASE NO. 62-624

PAN-AMERICAN LIFE INSURANCE COMPANY,
Appellant,

vs.

MARIE LORIDO,
Appellee.

PETITION FOR REHEARING

Comes now PAN-AMERICAN LIFE INSURANCE COMPANY, Appellant herein, and moves this Honorable Court to grant a rehearing of this cause, and for grounds thereof shows:

1. The opinion in this case affirms the judgment of the lower court on the authority of the opinion of this court in the case of PAN-AMERICAN LIFE INSURANCE COMPANY v. RECIO (Case No. 62-452).

2. Your petitioner has filed a petition for rehearing in the last mentioned case, a true copy of which is attached hereto and made a part hereof, and your petitioner adopts the statements therein contained as the grounds of this petition.

3. The opinion of this court in the RECIO case did not refer to or otherwise pass upon the defense asserted by your petitioner in that case based upon Cuban Law No. 568, the Bretton Woods Agreement relating to the International Monetary Fund, and the Federal legislation pertaining thereto (22 U.S.C.A. 286 et seq.). Your petitioner assumes that this was due to the fact that this court had previously stricken from your petitioner's brief in the RECIO case the section relating to this defense. No such action was taken in the present case and the sufficiency of this defense was argued both in the briefs and in oral argument. An express ruling by this court upon such an important matter as a Federal executive agreement approved by both Houses of the Congress and legislated in part into the law of the United States (22 U.S.C.A. 286 h) would be of great assistance to other courts which will be called upon to pass on this matter in other cases. The legal questions presented by this defense are of such importance that they should not be disposed of **sub silentio.**

Respectfully submitted,

DIXON, DeJARNETTE, BRADFORD, WILLIAMS, McKAY & KIMBRELL
9th Floor, Dade Federal Building
Miami, Florida

By: s/ James A. Dixon
Attorneys for Appellant

PETITION FOR REHEARING

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT

CASE NO. 62-452

PAN-AMERICAN LIFE INSURANCE COMPANY,
Appellant;

vs.

AGUSTIN GOYTISOLO RECIO,
Appellee.

Comes now PAN-AMERICAN LIFE INSURANCE COMPANY, Appellant herein, and petitions this Honorable Court to grant a rehearing in this cause, and as grounds for this petition shows:

1. The opinion in this case was filed May 7, 1963. A few days later on May 14, 1963, this Court filed an opinion in Case No. 61-827, styled NATIONAL INSTITUTE OF AGRARIAN REFORM v. TERRY KANE, et al.

2. Your petitioner respectfully suggests that these two opinions are inconsistent with each other, as will hereafter be pointed out.

(a) The confiscation complained of in the Kane

case was effected under Resolution No. 3, of October 24, 1960, of the Republic of Cuba. If the Court will refer to the text of this resolution attached to the Answer of your petitioner in the Circuit Court, the Court will see that AGENCIO de TRACTORES y EQUIPOS, of which the Kanes were stockholders, is listed as one of the concerns expropriated by section 1 of that resolution. Its name appears in Group XXI in that section. This is the same resolution which expropriated your petitioner whose name appears in Group XX of this same section.

(b) In section 2 of this resolution, it is provided that the Cuban State is substituted as the obligor on the liabilities of the expropriated concerns. See also the affidavit of the Cuban lawyer, DR. MENDIGUTIA.

(c) In the Kane case, the opinion recognizes that the expropriation effected by the first section of the resolution was an "act of state" on which the courts of this country will not sit in judgment.

(d) In this case, the court apparently says that the substitution of obligors effected by the second section of the resolution was not an "act of state" and refused to recognize its effectiveness upon the rights of Cuban nationals. Your petitioner is thereby de-

prived of a defense accruing to it under Cuban law.

(e) The application of the "act of state" doctrine in the Kane case frees an agency of the Republic of Cuba from liability to an American citizen. The refusal to apply that doctrine in this case imposes a liability on an American company from which the law of the plaintiff's sovereign has relieved it.

3. This Court has apparently in this case relied heavily upon the case of BANCO NACIONAL de CUBA v. SABBATINO, 307 F.2d 845, notwithstanding the fact that in that case certiorari has been granted by the U. S. Supreme Court, although this fact is adverted to in the Kane opinion. The opinion in this case also relies upon the case of RODRIGUEZ v. PAN-AMERICAN, 311 F.2d 429, which is now pending in the U. S. Supreme Court on petition for certiorari. The Court in this case has apparently overlooked the fact that neither of these cases is final.

4. The opinion in this case states that your petitioner relies "most heavily" upon the case of DOUGHERTY v. EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, 266 N. Y. 71, 193 N. E. 897, which the opinion then proceeds to distinguish on its particular facts. The Court has apparently overlooked the fact that your petitioner relies even more heavily upon cases such as BERNSTEIN v. VAN HEYGHEN

FRERES, 163 F.2d 246, and PONS v. REPUBLIC OF CUBA, 294 F.2d 925, (cert. denied in both) which are recognized as controlling authority in the Kane opinion. Your petitioner also relies heavily upon the decision in TILLMAN v. NATIONAL CITY BANK, 118 F.2d 631 (cert. denied 314 U. S. 1000, 62 S. Ct. 96, 86 L. Ed. 521) in its holding that a recognized foreign sovereign has the power to force an "involuntary novation" upon its nationals.

5. Since the opinion in this case does not discuss or even cite the case of PAN-AMERICAN LIFE INS. CO. v. BLANCO, 311 F.2d 424, your petitioner can only assume that the Court has overlooked it.

6. The opinion in this case says that your petitioner asks that this Court "enforce the expropriation decrees entered by the present government of Cuba." This portion of the opinion does not fairly state the position of your petitioner. That position is that Resolution No. 3 not only expropriated the Cuban assets of your petitioner but also, and most important, substituted the Cuban State as the obligor upon prior liabilities. Recognition of this *fact* is a far cry from "enforcing expropriation decrees". This resolution is used as a shield by your petitioner, not as a sword. In the Kane case, the opinion permitted it to be used as a shield by the NATIONAL INSTITUTE OF AGRARIAN REFORM. In the SABBATINO case, the National Bank of Cuba was using the resolution as a sword, asking

affirmative relief based upon it. We believe that the Court in this case has overlooked this distinction.

Respectfully submitted,

DIXON, DeJARNETTE, BRADFORD, WILLIAMS, McKAY & KIMBRELL,
9th Floor, Dade Federal Building,
Miami 32, Florida,

By: JAMES A. DIXON
Attorneys for Appellant.

CERTIFICATE OF SERVICE

I CERTIFY that on this 15th day of May, 1963, a true copy of the foregoing Petition for Rehearing was mailed to CAREY, GOODMAN, TERRY, DWYER & AUSTIN, 650 Seybold Building, Miami 32, Florida, the attorneys of record for the Appellee herein.

JAMES A. DIXON

PAN-AMERICAN LIFE INSURANCE COMPANY,
Appellant,

v.

AGUSTIN GOYTISOLO RECIO,
Appellee.

No. 62-452

District Court of Appeal of Florida,
Third District.
May 7, 1963

Rehearing Denied June 26, 1963

PEARSON, TILLMAN, Chief Judge.

The defendant-insurance company appeals a summary final decree for plaintiff-policyholder in an action for declaratory decree. The complaint sought a declaration that the policyholder was entitled to the cash-surrender value of the insurance policy. We affirm.

The complaint of the policyholder made a copy of the insurance policy an exhibit. It appears without conflict that the defendant, Pan-American Life Insurance Company, is a corporation under the laws of the State of Louisiana, having its principal office in New Orleans, Louisiana. The policy provides for payment thereunder in United States dollars in New Orleans, Louisiana. The defendant-insurance company answered alleging that the

acts of the Cuban Government in seizing its assets located in Cuba excused it from further performance under the contract of insurance sued upon. The court granted a summary decree for the plaintiff.

[1] It is the general rule that unless a contrary intention is expressed in the contract, matters connected with the performance are regulated by the law prevailing at the place of performance. Scudder v. Union National Bank of Chicago, 91 U.S. 406, 23 L.Ed. 245 (1875); Brown v. Ford Motor Co., 48 F.2d 732 (10th Cir. 1931); Repsold v. New York Life Ins. Co., 216 F.2d 479 (7th Cir. 1954); see also Restatement, Conflict of Laws, §358 (1934).

[2] Clearly then, a contract of a United States corporation payable in the United States in United States dollars cannot be governed by Cuban laws as to the method of performance.

This Court has recently had occasion to make exhaustive inquiry into problems similar to those presented in this appeal. See Confederation Life Ass'n v. Ugalde, Fla.App. 1963, 151 So.2d 315. Under the law set forth in that opinion, the fact that the contract involved in the instant appeal is to be paid in the United States is determinative of the issue of whether the law of this country governs the method of performance.

The additional factor which is present in this case is the contention of the insurance company that the acts of the Cuban Government in seizing the Company's assets located in Cuba excused the Company from further performance under the contract sued upon. In its answer the defendant-appellant pleaded as one of its defenses that

in July of 1960, the Republic of Cuba enacted Law No. 851 which authorized the issuance of resolutions of expropriation, and pursuant thereto, on October 24, 1960, Resolution No. 3 was promulgated, expropriating the Cuban assets of the Pan American Life Insurance Company and substituting the Cuban state as the obligor on existing policies.

After the filing of the answer, the plaintiff moved for a summary final decree. In opposition to the motion the defendant submitted two affidavits, one of Dr. Fernando C. Mendigutia, a Cuban lawyer now resident in Miami, the other of Mr. J. V. Bird, formerly the general manager and agent for Pan American Life Insurance Company in Cuba. In that portion of Dr. Mendigutia's affidavit which is relevant to the defense now discussed, he sets forth his opinion that Law No. 851 of July, 1960, authorized the issuance of decrees of expropriation and nationalization, and that pursuant thereto on October 24, 1960, Resolution No. 3 was signed which expropriated the Cuban assets of Pan American, substituting the Cuban state as the obligor on the Company's Cuban policies including the policy in this suit. Mr. Bird's affidavit sets forth that on October 26, 1960, he delivered all of Pan American's assets to the Cuban administrator appointed under the expropriation resolution.

Appellant argues that expropriation decrees of recognized foreign sovereigns, insofar as they affect the rights of nationals of that sovereign, have been given effect in the courts of this country. In support of this proposition, it cites many cases holding that under the act of state doctrine the courts of the United States will not recognize a right of action based upon the claimed invalidity of an

act of the government of a foreign state affecting its own nationals in its own territory. It is not necessary for us to discuss and analyze the recent developments of the act of state doctrine as this doctrine has been applied to the decrees of the present government of Cuba. This task has been undertaken elsewhere. See Banco Nacional de Cuba v. Sabbatino, 307 F.2d 845 (2d Cir.1962); Rodriguez v. Pan American Life Ins. Co., 311 F.2d 429 (5th Cir.1962).

[3] We do not find that the act of state doctrine is applicable to the situation here before us. The appellant, an American insurance company, did business not only in the Republic of Cuba, but in the United States. As previously mentioned, the policy here involved was payable in the United States. Its contact with the law of Cuba was that it was sold there to a Cuban citizen. A fair reading of the policy makes it apparent that an important provision was that the policyholder might travel to the United States and that the policy would be paid in the United States. It must therefore be concluded that the purpose of this provision was to obligate the American company to pay in America without regard to the vicissitudes of Cuban law.

The appellant, insurance company, now asks that the courts enforce the expropriation decrees entered by the present government of Cuba. It asks the enforcement of the decrees by means of an affirmative defense; that is, the denial of the policyholder's recovery because of the existence of the decrees. As authority for its defense, the appellant relies most heavily upon the case of Dougherty v. Equitable Life Assur. Soc'y of United States, 266 N.Y. 71, 193 N.E. 897 (1934). It there appeared that Equitable Life and a number of other American life in-

surance companies had qualified to do business in Russia. They issued policies in Russia to Russian nationals. The Russian branches of the American companies were expropriated by the Soviet Government, which substituted a system of state support of its nationals and abolished the institution of insurance. After recognition of Soviet Russia by the United States, test cases were filed in New York against the companies for various benefits under the policies. The plaintiffs were successful in the lower courts but in the highest appellate court, they failed. As we gather the basis for the holding, it is that inasmuch as the contracts involved were Russian contracts payable in Russia, in Russian funds, and exclusively from Russian assets, the liability would be governed by Russian law. We do not think that this reasoning is applicable to the present case where the total assets of the appellant are pledged to the payment of the contract, and the contract is payable in the United States. As we have previously set forth, it is our holding that the law of the place of payment, or United States law, applies to this contract. Therefore, the expropriation decrees are not a bar to the action upon the policy.

Affirmed.

COURT OF APPEAL
FOURTH CIRCUIT
STATE OF LA.

NO. 771

CARLOS MANUEL THEYE y AJURIA,

Plaintiff-Appellee

vs.

PAN AMERICAN LIFE INSURANCE CO.,

Defendant-Appelant

APPEAL FROM THE CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS NO. 394-783, HONORABLE CLARENCE DOWLING, JUDGE

A. WILMOT DALFERES
JUDGE AD HOC

JUNE 14, 1963

(Court composed of Judge Jess Johnson, Earl H. Edwards ad hoc, and A Wilmot Dalferes ad hoc)

CHAFFE, McCALL, PHILLIPS, BURKE & HOPKINS;
JAMES G. BURKE, JR.,
Attorneys for Plaintiff-Appellee

G. FRANK PURVIS, JR. & SOLOMON S. GOLDMAN,
Attorneys for Defendant-Appellant

REVERSED AND RENDERED

Plaintiff, a Cuban National born in Cuba, applied to Pan-American Life Insurance Company for a policy of life insurance in Havana, Cuba, through the Havana represenative of defendant insurance company in May of 1928. For several years prior to the issuing date of this policy, defendant was authorized to do business in the Republic of Cuba, after complying with Cuban statutory regulations pertaining to the insurance field.

Plaintiff's application was in due course referred to the Home Office of defendant in New Orleans, Louisiana. Upon approval of the application, the policy in regular form, written in the Spanish language, was forwarded to the Havana agent of defendant who, after having it countersigned by an agency of the Cuban government, delivered same to the plaintiff. The plaintiff paid to defendant fourteen annual installments on the policy and in the year 1942 selected, as one of the alternatives in the policy provisions, to have the policy converted to a paid-up policy.

A payment known as a "persistency bonus" became due under the policy in 1948.

In 1948, the Cuban government adopted Law No. 13,

which provided that after 1951 United States currency might no longer be used in Cuba, and the Cuban peso would become the sole form of legal tender there. By the Monetary Law of Cuba of 1951, all contracts payable to or by Cuban Nationals were required to be paid in Cuban pesos only.

In November of 1948, in May of 1950, and in February of 1952, the plaintiff made loans against the policy in varied amounts and in each instance the proceeds of such loan in pesos were paid to plaintiff by a check drawn on the Havana, Cuba, office of the National City Bank of New York. Each of such loans to defendant company was repaid by plaintiff, who likewise made the payment in Cuban pesos. All the payments were made in Cuba to defendant's Cuban agent and deposited in a Cuban bank.

In January of 1959, the Castro Government came into power after a revolution. The government of the United States recognized and maintained diplomatic relations with the Cuban government until about October 26, 1960.

From 1928, the date of the issuance of the policy in controversy, until some date subsequent to the date of the nationalization of respondent insurance company, plaintiff continued to live in Cuba as a Cuban National.

Subsequent to the nationalization of respondent's business, plaintiff left Cuba and is now a refugee in the United States. Upon his arrival in the United States he appeared at the office of defendant's company in New Orleans and demanded the cash surrender value of the

policy. Upon the refusal of defendant to pay the same, this action followed.

This matter was submitted to the Court for summary judgment on admissions, interrogatories, and stipulation.

The trial Court rendered judgment in favor of plaintiff and against defendant in the amount of SEVEN THOUSAND NINETY AND NO/100 ($7090.00) DOLLARS. From this judgment defendant has appealed.

It is elementary law that a sovereign government, having a definite interest in insurance contracts, can enact legislation for the protection of its citizens, controlling the insurance business within its bounds.[1] As the United States Supreme Court said in Osborn v. Ozlin, 310 U.S. 763,

> "The state may fix insurance rates, German Alliance Ins. Co. v. Lewis, 233 U.S. 389, 34 S. Ct. 612, 58 L. Ed. 1011, L.R.A. 1915 C, 1189; it may regulate the compensation of agents, O'Gorman & Young v. Hartford Ins. Co., 282 U.S. 251, 51 S. Ct. 130, 75 L. Ed. 324, 72 A.L.R. 1163; it may curtail drastically the area of free contract, National Union Fire Ins. Co. v. Wanberg, 260 U.S. 71, 43 S. Ct. 32, 67 L. Ed. 136. States have controlled the expenses of insurance companies, New York Insurance Law, Consolidated Laws

[1] Buxton v. Mid-Western Insurance Co., 102 Fed. Supp. 500; Lewis v. Manufacturers Casualty Insurance Company, 107 Fed. Supp. 465; Boring et als v. Louisiana State Insurance Company, 154 Louisiana Reports 550, 970 So. 856; Strauss v. N. Y. Life Insurance Co., 15 So. (2) 61.

of New York, c. 28, Sect. 244, and Wisconsin Statutes, Sect. 201.21; and see Report of Joint (Armstrong) Insurance Investigation Committee (N.Y.) pp. 403-418 (1906). They have also promoted insurance through savings banks; see Berman, the Massachusetts System of Savings Bank Life Insurance, Bulletin No. 615, U.S. Bureau of Labor Statistics, and New York Laws of 1938, c. 471. In the light of all these exertions of state power it does not seem possible to doubt that the state could, if it chose, go into the insurance business, just as it can operate warehouses, flour mills, and other business ventures, Green v. Frazier, 253 U.S. 233, 40 S. Ct. 499, 64 L. Ed. 878, or might take 'the whole business of banking under its control.'"

Our learned brother, the trial Court, resolved the issues as follows:

"The Court is of the opinion that any laws or decrees of the Republic of Cuba passed subsequently to the date upon which the policy became a paid-up policy of insurance could have no effect upon the obligation which existed at that time.[*] Said obligation continued from that date to now be an obligation under the laws of the State of Louisiana and subject to and governed only by said Law, if the beneficiary or the insured under said policy presented himself in the State of Louisiana to enforce the obligations contained therein."

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[*]This policy became a paid-up policy in the year 1942, at the election of plaintiff.

It must be remembered that plaintiff is a Cuban National. It is a well established principle of law, recognized by all appellate Court decisions, that a recognized Sovereign Nation can make laws binding upon its nationals within its bounds. Chief Justice Marshall in The Antelope, 10 Wheat 67, 6 L. Ed. 268, said:

> "No principle of general law is more universally acknowledged than the perfect equality of Nations. Russia and Geneva have equal rights. It results from this equality that no one can rightfully impose a rule on another. Each legislates for itself, but its legislation can operate on itself alone."

When Castro rose to power, his government was recognized by the United States of America. Diplomatic relations were maintained between the United States and Cuba, until October 26, 1960. Plaintiff did not leave Cuba until November 4, 1960. On September 29, 1959, following Castro's rise to power, Law 568 was promulgated. That law prohibited Corporations doing business in Cuba, from making payments, or even making any entries in their books which would result in credit being made available to Cuban Nationals, except in Cuba, and without express authorization of the National Bank of Cuba. Violators of said law were subject to criminal penalties.

Further, on October 24, 1960, all of the affairs and assets of Pan American Life Insurance Company in Cuba were nationalized. The investments, properties and reserves of the said Company were taken over by the Cuban Government, which substituted itself as insurer and as-

sumed all liabilities of the Company; in fact, the business of the Company was carried on through a government appointed administrator.

Certainly any Sovereign Nation can and has the power to change the situs of its National's contracts. Further, a nation can and does frequently impair the obligations of contract. Even our own country did this in the Gold Clause Cases, 294 U.S. 240, 319, 330; 79 L. Ed. 885, 905, 912. We do have a provision in the United States Constitution preventing the States of the Union from enacting ex post facto law or laws impairing the obligation of contract. (See 10, U.S. Constitution). But it is within the Sovereign power of the United States Government to do these acts if in its National interests it sees fit to do so.

The Courts of this country can take judicial notice of treaties made between the U.S. Government and foreign governments. United States v. Reynes, 50 U.S. 127, 13 L. Ed. 74; LaCroix Fels v. Sarrazin, 15 Fed. 489. Further, our Courts will take judicial notice of the Acts of Congress and presidential proclamations. Williams v. Windham, 3 La. Appeals 127; Powell-Meyers Lumber Co. v. Tremont & Gulf Realty Co., 2 La. Appeals 164.

With these legal propositions before us, the Court must recognize and give effect to the Bretton Woods Agreement signed by the United States, Cuba, and some ninety-five sovereign Nations in 1945. Each signatory to the Compact, which included an International Monetary Fund, bound itself to take steps to implement the principles of the international accord, as part of its

domestic law. Our own Congress honored its commitment by enacting a statute to that effect. (22 USCA 286 et seq.)

Article VIII, Sec. 2 (b) of the Agreement, among other things, provided as follows:

> "Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member . . . shall be unenforceable in the territories of any member."

By accepting and implementing the above, our congress has undertaken to make the above principle, a part of our national law. On June 14, 1949, the International Monetary Fund, binding on all its members, including Cuba and the United States, issued the following interpretation of Art. VIII, Sec. 2(b):

> "An obvious result of the foregoing undertaking is that if a party to an exchange contract referred to in Article VIII, Sec. 2(b) seeks to enforce such a contract, the tribunal of the member country before which the proceedings are brought will not, on the ground that they are contrary to the public policy of the forum, refuse recognition of the exchange control regulations of the other member which are maintained or imposed consistently with the Fund Agreement. It also follows that such contracts will be treated as unenforceable notwithstanding that under private international law of the forum is not the law which governs the exchange contract or its performance . . . "

Cuban Law 568 of September 29, 1959, required payments between plaintiff and defendant be made in Cuba, regardless of the language of the contract. Despite this, plaintiff attempts to defy the decrees and laws of Cuba, the sovereign to whom he owed allegiance, to come into this country and collect his debt in the currency of another nation. This would nullify and frustrate his own sovereign's legislative will and powers.

Prior to the Bretton Woods Agreement, plaintiff's position might have been upheld. Our Courts have held it to be the public policy of the forum State to refuse to give effect to exchange control legislation of a foreign sovereign, where such was labelled by the forum as penal, punitive, confiscatory or violative of fundamental concepts of justice. In this connection, the Court calls attention to the cases and authorities cited therein of Menendez Rodriguez vs. Pan American Life Insurance Co., 311 Fed. 2d 429 and Pedro Menandez vs Aetna Insurance Co., 311 Fed. 2d, 432.

This Court believes, and so holds, that the Bretton Woods Agreement and our Acts of Congress (22 USCA 286, et seq.) supercede the principles enunciated in the above authorities, as to parties or nations who signed the agreement or treaty. It is now our national policy to deny enforcement, in the Court of this land, of contracts which would frustrate the exchange control regulations of another member of the agreement. Our Congress gave recognition to the will of the signatories to the agreement, declaring that the public policy of its members would be better served by a measure of collaboration among them designed to give effect to each other's exchange control regulations. The U. S. Supreme Court, in

Kolovrat vs. Oregon, 366 U.S. 187, 81 Supreme Court 922, 6 L. Ed. 218, decided May 1, 1961, interpreted the Bretton Woods Agreement as follows:

> "These treaties and agreements show that this Nation has adopted programs deemed desirable in bringing about, so far as can be done, stability and uniformity in the difficult field of world monetary controls and exchange . . . Doubtless, these agreements may fall short of that goal. But our National Government's powers have been exercised so far as deemed desirable and feasible toward that end, and the power to make policy with regard to such matters is a national one from the compulsion of both necessity and our constitution."

We find that the Court below disregarded the above treaty accord between the United States and Cuba and our own Congressional enactments to implement this agreement. Our Courts should not and cannot enforce a contract which transcends the sovereign will of Cuba touching on monetary contracts involving its own nationals. Plaintiff demands should have been rejected.

It must also be remembered that this defendant complied with the laws of Cuba in the operation of its Cuban Agency by maintaining reserves in Cuba to insure the payment of its Cuban obligations, including this policy. When the Castro government nationalized the insurance business, it took over those reserves and any other assets of this defendant in Cuba and went into the insurance business, of which this policy was a part. If this judgment by the trial court is enforced against this defendant in Lou-

isiana, it will amount to a payment of the obligation twice, for the reason that this defendant cannot now withdraw the amount of the judgment from its reserves and assets in Cuba which reserves were put up to insure payment of this and other policies in Cuba.

While it may be more advantageous for plaintiff to have sought relief in the Louisiana Courts and to have urged the application of Louisiana law to the terms of the contract as originally written, the selection of the forum does not dictate the application of the law of the forum; nor can the forum ignore the modifications of a contract by a sovereign government under its police powers and its domination over its citizens, especially when that sovereign government has been recognized by the Executive Department of the United States. There can be but one law applicable to this contract, and we hold that the present law of Cuba, which nationalized under Cuba's police powers the insurance business, including defendant's company, at a time when plaintiff was a resident and national of Cuba, is the applicable law.

The judgment of the District Court is reversed and plaintiff's suit is dismissed at his costs.

REVERSED AND RENDERED

NATIONAL INSTITUTE OF AGRARIAN REFORM,
Appellant,

vs.

TERRY KANE, doing business as Agencio de Tractores y Equipos, S.A., and individually, Terry Kane, H. A. Kane, and Louis Kane, as successors to and last Board of Directors of Agencio de tractores y Equipos, S.A., and as holders of a majority of stock of said inoperative former corporation on behalf of all stockholders thereof,
Appellees.

No. 61-827.

153 So.2d 40

District Court of Appeal of Florida
Third District
May 14, 1963.

Before PEARSON, TILLMAN, C. J., and CARROLL and HORTON, JJ.

PEARSON, TILLMAN, Chief Judge.

The National Institute of Agrarian Reform is an arm of the present government of Cuba. It was the defendant in the trial court in an action to recover damages for the expropriation of the assets of a Cuban corpora-

tion. The complaint alleged that the defendant-appellant " * * * did take over and seize and confiscate the business, assets, personalty and property, both real, personal and mixed, of your plaintiffs, but armed might, at the point of bayonets, without prior notice or warning of any sort. * * * "

The appellees are citizens of the United States who stated that they were the holders of a majority of the stock in the Cuban corporation. It was further stated that the action was brought on behalf of all the stockholders of the corporation. After finding jurisdiction over the subject matter and the parties, the trial judge granted final judgment for the plaintiffs in a non-jury trial. The defendant appeals this judgment.[1]

Since this litigation involves an arm of the sovereign government of Cuba as the defendant, we must first deal with the effect, if any, of the doctrine of sovereign immunity. Without detailing the various restrictions placed on this doctrine in recent years (none of which negate its use as a defense in the instant case), it prevents a court from entertaining jurisdiction over a foreign state or its property. On first glance, the correct disposition of the case herein discussed would appear to be a dismissal for lack of jurisdiction over the person of the defendant. The doctrine, however, is not self-executing. The procedure for raising a question of sovereign immunity is by making it a subject of diplomatic representation to the United States Department of State; and the claim, if recognized,

[1] By previous opinion, this Court sustained a plea of sovereign immunity from execution as to the judgment here reviewed. State ex rel. National Institute of Agrarian Reform v. Dekle, Fla.App.1962, 137 So.2d 581.

may be set forth and supported in an appropriate suggestion to the court by the Attorney General of the United States or an officer acting under his direction. Banco Nacional de Cuba v. Steckel, Fla. App. 1961, 134 So.2d 23. The record does not disclose that such action was taken. Therefore, the trial court could not have recognized such a defense, nor can it be considered on appeal. It is to be noted from a suggestion for sovereign immunity **from execution** was filed in this cause by the Attorney General of the United States subsequent to judgment in the court below. State ex rel. National Institute of Agrarian Reform v. Dekle, Fla. App. 1962, 137 So.2d 581. This, however, is not to be considered an immunity **from suit.**[2]

Since we have determined that jurisdiction over the person of the defendant existed, we now consider whether or not the trial court had jurisdiction over the subject matter. This requires an analysis of another doctrine of law—the so-called "act of state" doctrine. This doctrine has evolved in the courts whereby these judicial tribunals refuse to question the validity of legislative or executive acts of a foreign government performed within its own borders. See The Castro Government in American Courts: Sovereign Immunity and the Act of State Doctrine, 75 Harv. L.Rev. 1607 (1962). Although application of this doctrine usually involves an immunity extending to property rights which private citizens prove were originally vested in them by acts of the foreign sovereign, the basic

[2]In Harris & Co. Advertising, Inc. v. Republic of Cuba, Fla.App. 1961, 127 So.2d 687, we discussed the traditional rule which denies one sovereign the right to sit in court over another sovereign. The holding in the Harris case is not pertinent here since involved there was the doctrine of sovereign immunity (not applicable here as shown above) and the liability of a foreign sovereign to suit for commercial acts performed in this country.

reasoning underlying the doctrine would extend its application to a situation in which the sovereign is a party in litigation involving private rights affected by that foreign sovereign's acts.

Appellees would not deny the existence of the act of state doctrine, but seek to avoid its application on three grounds: first, the policies underlying this judicial self-restraint do not apply where the foreign act is a violation of international law; second, it is the proper policy for the courts of this country to refuse to recognize discriminatory confiscation of the property of Americans situated in Cuba; and third, the doctrine does not apply since the Department of State has announced that the effect of the foreign decree is for the court to determine. To support these arguments the appellant relies heavily upon the decision of the United States Court of Appeals for the Second Circuit in Banco Nacional de Cuba v. Sabbatino, 307 F.2d 845 (2nd Cir. 1962). At the time that our trial court entered its judgment, it had before it only the opinion in the case by the United States District Court which is reported at 193 F.Supp. 375 (S.D. N.Y. 1961). It is to be noted that the United States Supreme Court has granted certiorari in the matter.

In the Sabbatino case, a New York sugar brokerage firm had contracted to purchase certain sugar from a Cuban corporation, the majority of whose stock was owned by American residents. On the same day the commodity was being loaded for shipment, the Cuban government signed a resolution nationalizing and seizing all of the assets of the Cuban corporation. In order to secure the necessary consent of the Cuban government to ship the sugar, the broker made a second contract to purchase the

sugar from the Cuban government. The second contract was assigned to the Banco Nacional. When the broker resold the sugar, a New York State Court awarded the proceeds of the sale to a state receiver appointed to manage the remaining assets of the Cuban corporation which had been nationalized.

The Banco Nacional then brought its action in the United States court against the broker and the receiver, claiming conversion of the bills of lading and the proceeds of the sale. It asserted the act of state doctrine as a bar to any question as to its title. The District Court held the seizure to have been confiscatory and void under international law and entered judgment for the defendants.

Upon appeal, the United States Court of Appeals for the Second Circuit held that the Cuban decree of expropriation violated international law because it failed to provide adequate compensation and because it involved a retaliatory purpose and a discrimination against United States nationals. It held, therefore, that the title of the Banco Nacional to the sugar was invalid and affirmed the decision of the District Court which dismissed the complaint.

We find the Sabbatino opinions persuasive, but not determinative as applied to the facts of the instant case. In the Sabbatino case, the action was by a Cuban bank, an arm of the Cuban government, invoking the aid of a court of the United States to act affirmatively to enforce a foreign decree which was patently obnoxious to the public policy of the forum. If the court had applied the act of state doctrine, this would have been the necessary result. In the case before us, American nationals seek to

enforce a claim of conversion in Cuba because of the alleged invalidity of a decree of the Cuban government. There is a recognizable distinction between the refusal to enforce a foreign law which is repugnant to the public policy of the forum [See Loucks v. Standard Oil Co. of N. Y., 224 N.Y. 99, 120 N.E. 198 (1918)] and refusing to pass on the validity under the law of a foreign state of the acts of its officials [See Bernstein v. Van Heyghen Freres Societe Anonyme, 163 F.2d 246 (2nd Cir. 1947), cert. denied, 332 U.S. 772, 68 S.Ct. 88, 92 L.Ed. 357 (1947); Pons v. Republic of Cuba, 111 U.S. App. D.C. 141, 294 F.2d 925 (D.C. Cir. 1961), cert. denied, 368 U.S. 960, 82 S.Ct. 406, 7 L.Ed.2d 392 (1962). By analogy, we cannot declare the invalidity of a Cuban decree as a basis for creating a right of recovery in the plaintiff in this cause.

The appellees urge that inasmuch as the record in this case contains a telegram to the attorneys for the plaintiffs stating "* * * Effect in U. S. of decrees, etc. of Castro regime is question for court in which case heard", our government does not oppose inquiry by American courts into the legality of the act of the foreign government. It is then argued that this announcement constitutes an exception under which the act of state doctrine should not be applied. We are unable to agree with the effect appellees give to the telegram. The extent to which the telegram can be given effect is simply that the Executiv Department of the United States Government will not interpose itself one way or the other in this litigation.

To declare invalid an act of expropriation by the Cuban Government of the property of a Cuban corporation in Cuba because such act is discriminatory, arbitrary and confiscatory would be a denial of the sovereignty of

a foreign state. To do so would violate the tradition of judicial reluctance to act in areas of executive prerogative. In other words of one author, it would be " * * * an unnecessary excursion into an area in which the principals of law are elusive, political repercussions are imminent, and pronouncements of a municipal court have little extraterritorial effect save to offend a foreign sovereign." 110 U.Pa.L.Rev. 127 (1961).

While the actions of the Cuban Government may well do injury to the essence of justice as we view it, they are not our acts, nor are we called upon to enforce them. The idea of the seizure of private property without compensation is repugnant both to our constitution and our very way of life, but unfortunately these views are not accorded the same import in all nations. The Supreme Court of the United States has long recognized that the seizure of private property by a foreign government is an exercise of sovereignty. Oetjen v. Central Leather Co., 246 U.S. 297, 38 S.Ct. 309, 62 L.Ed. 726 (1918); Ricaud v. American Metal Co., 246 U.S. 304, 38 S.Ct. 312, 62 L.Ed. 733 (1918).

The highest court of our land has said that "Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." Underhill v. Hernandez, 168 U.S. 250, 18 S.Ct. 83, 42 L.Ed. 456 (1897). This appears to be the law of the land at the present time, and we will not depart from its mandate.

Having found that the trial court lacked jurisdiction of the subject matter, the judgment appealed is reversed and the complaint dismissed.

Reversed.